United Nations A/CN.9/WG.II/WP.109

General Assembly

Distr.: Limited
1 September 2000

Original: English

United Nations Commission on International Trade Law
Working Group on Arbitration
Thirty-third session
Vienna, 20 November – 1 December 2000

PROVISIONAL AGENDA

1. Election of officers

2. Adoption of the agenda

3. Preparation of harmonized texts on: written form for arbitration agreements; interim measures of protection; and conciliation

3. Other business

5. Adoption of the report

Notes on the provisional agenda

1. The Commission, during its thirty-first session, held a special commemorative New York Convention Day on 10 June 1998 to celebrate the fortieth anniversary of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958). In addition to representatives of States members of the Commission and observers, some 300 invited persons participated in the event. The Secretary-General made the opening speech. In addition to speeches by participants in the diplomatic conference that had adopted the Convention, leading arbitration experts presented reports on matters such as the promotion of the Convention, its enactment and application. Reports were also made on matters beyond the Convention itself, such as the interplay between the Convention and other international legal texts on international commercial arbitration and on difficulties encountered in practice but addressed in existing legislative or non-legislative texts on arbitration.[1]

2. In reports presented at the commemorative conference, various suggestions were made for presenting to the Commission some of the problems identified in practice so as to enable it to consider whether any related work by the Commission would be desirable and feasible. The Commission, at its thirty-first session in 1998, with reference to the discussions at the New York Convention Day,

[1] *Enforcing Arbitration Awards under the New York Convention: Experience and Prospects* (United Nations publication, Sales No. E.99.V.2).

considered that it would be useful to engage in a discussion of possible future work in the area of arbitration at its thirty-second session. It requested the Secretariat to prepare a note that would serve as a basis for the considerations of the Commission.[2]

3. At its thirty-second session, in 1999, the Commission had before it the requested note, entitled "Possible future work in the area of international commercial arbitration" (A/CN.9/460).[3] Welcoming the opportunity to discuss the desirability and feasibility of further development of the law of international commercial arbitration, the Commission had generally considered that the time had arrived to assess the extensive and favourable experience with national enactments of the UNCITRAL Model Law on International Commercial Arbitration (1985), as well as the use of the UNCITRAL Arbitration Rules and the UNCITRAL Conciliation Rules, and to evaluate in the universal forum of the Commission the acceptability of ideas and proposals for improvement of arbitration laws, rules and practices.[4]

4. When the Commission discussed the topic, it left open the question of what form its future work might take. It was agreed that decisions on the matter should be taken later as the substance of proposed solutions became clearer. Uniform provisions might, for example, take the form of a legislative text (such as model legislative provisions or a treaty) or a non-legislative text (such as a model contractual rule or a practice guide). It was stressed that, even if an international treaty were to be considered, it was not intended to be a modification of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).[5]

5. The Commission entrusted the work to one of its three working groups, which it named Working Group on Arbitration, and decided that the priority items for the Working Group should be conciliation,[6] requirement of written form for the arbitration agreement,[7] enforceability of interim measures of protection[8] and possible enforceability of an award that had been set aside in the State of origin.[9] The Working Group on Arbitration (previously named Working Group on International Contract Practices) commenced its work at its thirty-second session in Vienna from 20 to 31 March 2000 (the report of that session is contained in document A/CN.9/468).

6. The Working Group considered the possible preparation of harmonized texts on conciliation, interim measures of protection, and on the written form of arbitration agreements. On these three topics the Working Group made decisions, which the Secretariat was requested to use in preparing drafts for the current session of the Working Group. In addition, the Working Group exchanged preliminary views on other topics that might be taken up in the future (document A/CN.9/468, paras. 107-114).

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[3] The note drew on ideas, suggestions and considerations expressed in different contexts, such as the New York Convention Day (*Enforcing Arbitration Awards under the New York Convention: Experience and Prospects*, United Nations publication, Sales No. E.99.V.2); the Congress of the International Council for Commercial Arbitration, Paris, 3-6 May 1998 (*Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention, International Council for Commercial Arbitration Congress Series No. 9*, Kluwer Law International, 1999); and other international conferences and forums, such as the 1998 "Freshfields" lecture: Gerold Herrmann, "Does the world need additional uniform legislation on arbitration?" *Arbitration International*, vol. 15 (1999), No. 3, p. 211.

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7. The Commission, at its thirty-third session (New York, 12 June – 7 July 2000), commended the work of the Working Group accomplished sc far. The Commission heard various observations to the effect that the work on the items on the agenda of the Working Group was timely and necessary in order to foster the legal certainty and predictability in the use of arbitration and conciliation in international trade. It noted that the Working Group had also identified a number of other topics, with various levels of priority, that had been suggested for possible future work (document A/CN.9/468, paras. 107-114). The Commission reaffirmed the mandate of the Working Group to decide on the time and manner of dealing with them.

8. Several statements were made to the effect that, generally, the Working Group, in deciding the priorities of the future items on its agenda, should pay particular attention to what was feasible and practical and to issues where court decisions left the legal situation uncertain or unsatisfactory. Topics that were mentioned in the Commission as potentially worthy of consideration, in addition to those that the Working Group might identify as such, were the meaning and effect of the more-favourable-right provision of article VII of the 1958 New York Convention (A/55/17, para. 109 (k)); raising claims in arbitral proceedings for the purpose of set-off and the jurisdiction of the arbitral tribunal with respect to such claims (ibid., para. 107 (g)); freedom of parties to be represented in arbitral proceedings by persons of their choice (ibid., para. 108 (c)); residual discretionary power to grant enforcement of an award notwithstanding the existence of a ground for refusal listed in article V of the 1958 New York Convention (ibid., para. 109 (i)); and the power by the arbitral tribunal to award interest (ibid., para. 107 (j)). It was noted with approval that, with respect to "on-line" arbitrations (i.e. arbitrations in which significant parts or even all of arbitral proceedings were conducted by using electronic means of communication) (ibid., para. 113), the Working Group on Arbitration would cooperate with the Working Group on Electronic Commerce. With respect to the possible enforceability of awards that had been set aside in the State of origin (ibid., para. 107 (m)), a view was expressed that the issue was not expected to raise many problems and that the case law that gave rise to the issue should not be regarded as a trend.

9. The Working Group on Arbitration is composed of all States members of the Commission. These are:

Algeria, Argentina, Australia, Austria, Botswana, Brazil, Bulgaria, Burkina Faso, Cameroon, China, Colombia, Egypt, Fiji, Finland, France, Germany, Honduras, Hungary, India, Iran (Islamic Republic of), Italy, Japan, Kenya, Lithuania, Mexico, Nigeria, Paraguay, Romania, Russian Federation, Singapore, Spain, Sudan, Thailand, Uganda, United Kingdom of Great Britain and Northern Ireland, and United States of America.

Item 1. Election of officers

10. The Working Group, in accordance with its practice at previous sessions, may wish to elect a Chairman and a Rapporteur.

Item 3. Preparation of uniform provisions on: written form for arbitration agreements, interim measures of protection, and conciliation

11. The Working Group will have before it, and may wish to use as a basis for its deliberations, the following documents:

(a) Report of the Secretary-General: Preparation of uniform provisions on: written form for arbitration agreements, interim measures of protection, and conciliation (A/CN.9/WG.II/WP.110);

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Item 5. Adoption of the report

12. The Working Group may wish to adopt, at the close of its session, a report for submission to the thirty-third session of the Commission (to be held from 25 June to 13 July 2001, in Vienna).

Dates and scheduling of meetings

13. The session of the Working Group on Arbitration will take place from 20 November to 1 December 2000 at the Vienna International Centre.*

14. There will be 8 working days available for consideration of the agenda item 3. No meeting will be scheduled for Thursday, 30 November, in order to allow for the preparation of the draft report of the session, which will be adopted on Friday, 1 December. Meeting hours will be from 9.30 to 12:30 and from 14:00 to 17:00, except on Monday, 20 November 2000, when the session will commence at 10:00 a.m.

15. It is suggested that the Working Group commence on 20 November with the discussion of the written form of an arbitration agreement, to take up interim measures of protection sometime on 22 November, as appropriate, and to consider conciliation on 27, 28 and 29 November. Possible future items of work (including uniform rules on the issuance of interim measures of protection by courts in support of arbitration) may be considered, time permitting, during the second half of the first week of the session. It should be noted that this suggestion is intended to assist States members and observers in planning the attendance of their pertinent representatives, but that the final actual scheduling will be determined by the Working Group itself.

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United Nations Commission on International Trade Law
Working Group on Arbitration
Thirty-third session
Vienna, 20 November - 1 December 2000

Settlement of commercial disputes

Possible uniform rules on certain issues concerning settlement of commercial disputes: written form for arbitration agreement, interim measures of protection, conciliation

Report of the Secretary-General

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Introduction

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9. The present document has been prepared pursuant to the discussion in the Working Group on the three topics and includes draft provisions prepared on the basis of the decisions taken by the Working Group.

I. Requirement of written form for the arbitration agreement

A. Introductory remarks

10. When the Working Group at its thirty-second session considered the issue of the requirement of written form for an arbitration agreement, it was generally observed that there was a need for provisions which conformed to current practice in international trade with regard to requirements for written form. It was noted that the practice in some respects was no longer reflected by the position set forth in article II(2) of the New York Convention (and other international legislative texts modelled on that article) if interpreted narrowly. It was also noted that national courts increasingly adopted a liberal interpretation of those provisions in accordance with international practice and the expectations of parties in international trade; nevertheless, it was observed, some doubts remained or views differed as to their proper interpretation. The existence of those doubts and a lack of uniformity of interpretation was a problem in international trade in that it reduced the predictability and certainty of international contractual commitments. It was further noted that current arbitration practice was different from what it was at the time the New York Convention was adopted in that arbitration was now widely accepted for resolution of international commercial disputes and could be regarded as usual rather than as an

exception that required careful consideration by the parties before choosing something other than litigation before the courts (document A/CN.9/468, para. 88; further discussion is reflected in paras. 89 to 99 of that document).

11. After discussion, the view was adopted by the Working Group that the objective of ensuring a uniform interpretation of the form requirement that responded to the needs of international trade could be achieved by: preparing a model legislative provision clarifying, for avoidance of doubt, the scope of article 7(2) of the UNCITRAL Model Law on International Commercial Arbitration; preparing a guide explaining the background and purpose of the model legislative provision; and adopting a declaration, resolution or statement addressing the interpretation of the New York Convention that would reflect a broad understanding of the form requirement. As to the substance of the model legislative provision and the interpretative instrument to be prepared, the Working Group adopted the view that, for a valid arbitration agreement to be concluded, it had to be established that an agreement to arbitrate had been reached and that there existed some written evidence of that agreement (A/CN.9/468, para. 99).

12. The Working Group also considered the question of whether article II(2) of the New York Convention should be interpreted broadly to include communications by electronic means as defined by the UNCITRAL Model Law on Electronic Commerce in article 2. It was recalled that the Guide to Enactment of the Model Law on Electronic Commerce, an instrument adopted by the Commission, was drafted with a view to clarifying the relationship between the Model Law on Electronic Commerce and international instruments such as the New York Convention and other trade law instruments. The Guide, at paragraph 6, suggested that the Model Law on Electronic Commerce "may be useful in certain cases as a tool for interpreting existing international conventions and other international instruments that create legal obstacles to the use of electronic commerce for example by prescribing that certain documents or contractual clauses be made in written form" (document A/CN.9/468, para. 100; further discussion is reflected in paras. 101 to 106).

13. After discussion, the Working Group requested the Secretariat to prepare a draft instrument that would confirm that article II(2) of the New York Convention should be interpreted to include electronic communications as defined by article 2 of the Model Law on Electronic Commerce (A/CN.9/468, para. 106).

14. The drafts below in sections B and C have been prepared pursuant to those considerations of the Working Group.

B. Model legislative provision on written form for an arbitration agreement

15. In accordance with the decision of the Working Group, the Secretariat has prepared a model legislative text revising article 7(2) of the UNCITRAL Model Law on International Commercial Arbitration. [10]

[10] Some national legislative texts that were used in preparing the drafts are reproduced in paragraphs 24 to 32 of document A/CN.9/WG.II.WP.108/Add.1, entitled "Possible uniform rules on certain issues concerning the settlement of commercial disputes: conciliation, interim measures of

Article 7. Definition and form of arbitration agreement

[Unchanged paragraph (1) of the Model Law:]

(1) "Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

Draft paragraph (2) of article 7:

(2) The arbitration agreement shall be in writing. For the purposes of this Law, "writing" includes any form *[alternative 1:]* provided that the [text] [content] of the arbitration agreement is accessible so as to be usable for subsequent reference, whether or not it is signed by the parties *[alternative 2:]* which [provides] [preserves] a record of the agreement,[11] whether or not it is signed by the parties.

(3) An arbitration agreement meets the requirement in paragraph (2) if:

(a) it is contained in a document established jointly by the parties;

(b) it is made by an exchange of written communications;

(c) it is contained in one party's written offer or counter-offer, provided that the contract has been [validly] concluded by acceptance, or an act constituting acceptance such as performance or a failure to object, by the other party;

(d) it is contained in a contract confirmation, provided that the terms of the contract confirmation have been [validly] accepted by the other party, either [expressly] [by express reference to the confirmation or its terms] or, to the extent provided by law or usage, by a failure to object;

(e) it is contained in a written communication by a third party to both parties and the content of the communication is considered to be part of the contract;

(f) it is contained in an exchange of statements [of claim and defence] [on the substance of the dispute] in which the existence of an agreement is alleged by one party and not denied by the other;

(g) [it is contained in a text to which reference is made in a contract concluded orally, provided that such conclusion of the contract is customary, [that arbitration agreements in such contracts are customary] and that the reference is such as to make that clause part of the contract.]

(4) The reference in a contract to a text containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.

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protection, written form for arbitration agreement".

[11] Alternative 1 is based on article 6 of the UNCITRAL Model Law on Electronic Commerce, while alternative 2 is modelled on article 7(2) of the UNCITRAL Model Law on International Commercial Arbitration.

Notes

16. Draft paragraph (3) sets out in some detail the situations in which an arbitration agreement meets the requirement in paragraph (2). The Working Group may wish to consider whether the broad purpose of paragraph (3) might be achieved by a shorter and more general formulation along the lines of:

(3) An arbitration agreement meets the requirement in paragraph (2) if it is contained in a document transmitted from one party to the other party or by a third party to both parties, provided that the content of the document is considered to be part of the contract in accordance with law or usage.

17. The Working Group considered at its thirty-second session several typical examples of situations where the parties have agreed on the content of a contract containing an arbitration agreement and where there is written evidence of the contract, but where, nevertheless, current law, if interpreted narrowly, may be construed as invalidating or calling into question the validity of the arbitration agreement. This may happen where (a) the parties have not signed a document containing the arbitration agreement (which regularly occurs when the parties are not at the same place when concluding the contract) and where (b) the procedure used by the parties for concluding the contract does not meet the test of "exchange of letters or telegrams" (art. II(2) of the New York Convention), if that test is interpreted literally. These fact situations include the following:

(a) A contract containing an arbitration clause is formed by one party sending written terms to the other, which performs its bargain under the contract without returning or making any other "exchange" in writing in relation to the terms of the contract;

(b) A contract containing an arbitration clause is formed on the basis of the contract text proposed by one party, which is not explicitly accepted in writing by the other party, but the other party refers in writing to that contract in subsequent correspondence, invoice or letter of credit by mentioning, for example, its date or contract number;

(c) A contract is concluded through a broker who issues the text evidencing what the parties have agreed upon, including the arbitration clause, without there being any direct written communications between the parties;

(d) Reference in an oral agreement to a written set of terms, which may be in standard form, that contain an arbitration agreement;

(e) Bills of lading which incorporate the terms of the underlying charterparty by reference;

(f) A series of contracts entered into between the same parties in a course of dealing, where previous contracts have included valid arbitration agreements but the contract in question has not been evidenced by a signed writing or there has been no exchange of writings for the contract;

(g) The original contract contains a validly concluded arbitration clause, but there is no arbitration clause in an addendum to the contract, an extension of the contract, a contract novation or a settlement agreement relating to the contract (such a "further" contract may have been concluded orally or in writing);

(h) A bill of lading containing an arbitration clause that is not signed by the shipper or the subsequent holder;

(i) Third party rights and obligations under arbitration agreements in contracts which bestow benefits on third party beneficiaries or stipulation in favour of a third party (*stipulation pour autrui*);

(j) Third party rights and obligations under arbitration agreements following the assignment or novation of the underlying contract to the third party;

(k) Third party rights and obligations under arbitration agreements where the third party exercises subrogated rights;

(l) Rights and obligations under arbitration agreements where interests in contracts are asserted by successors to parties, following the merger or demerger of companies, so that the corporate entity is no longer the same. [12]

18. The Working Group may wish to discuss the draft model provision in the light of these factual situations with a view to determining whether the draft adequately covers them, to the extent the Working Group intends them to be covered.

19. Case (a) (conclusion of the contract other than by sending a message) is intended to be dealt with by draft paragraph (3)(c) and (d) of the draft. Case (b) (reference to the contract terms in subsequent correspondence) may be regarded as resolved in that draft paragraph (3) does not require a written acceptance of the contract terms containing an arbitration clause (moreover, many courts have interpreted the current text of article II of the New York Convention so that a reference in subsequent correspondence to the contract text proposed by the other party constitutes acceptance of those terms including the arbitration clause). Case (c) (broker) is covered by draft paragraph (3)(e). Case (d) (oral reference to written terms) is addressed in draft paragraph (3)(g).

20. As to cases (f) and (g) (a contract with an arbitration agreement is followed by an another contract, an addendum, an extension, a novation or settlement), it appears that conclusions reached by the courts to a large extent depended on the facts of the case. In particular, the courts have sought solutions by interpreting the

[12] These fact situations were listed in para. 12 of document A/CN.9/WG.II.108/Add.1. Among them was also the case where a claimant seeks to initiate an arbitration against an entity not originally party to the arbitration agreement, or where an entity not originally party to the arbitration agreement seeks to rely on it to initiate an arbitration, for example, by relying on the "group of companies" theory (*ibid.*, para. 12 (m)). However, the Working Group considered that that situation raised difficult issues and the idea of a harmonised rule did not gain wide acceptance (A/CN.9/468, para. 95).

original contract and the subsequent agreements and establishing whether the parties intended that some terms in the original contract, including the arbitration agreement, were to be carried over into the subsequent agreement. Nevertheless, it appears that, in addition to the facts of the case, courts have been guided by their view of arbitration and whether the writing requirement should be interpreted broadly or narrowly. For example, when considering whether a subsequent oral agreement fell within the scope of the arbitration clause in the original contract, one court said that in view of the strong policy in favour of arbitration only in those cases where it can be said with absolute certainty that the parties did not intend to submit the dispute to arbitration will the dispute not be referred. In a similar case in which the original written contract was followed by another related contract, another court took the view that even if the court were to construe the agreement narrowly, the evidence was insufficient to prove conclusively that the parties did not intend to arbitrate the dispute so the court felt required to refer the dispute to arbitration. On the other hand, in considering whether a protocol to a contract was covered by the arbitration clause in the original contract, the court held that the clause did not extend to the protocol because, in order for the clause to be binding, the parties would have to indicate that intention with utmost precision. The additional question whether, where a dispute on a contract is settled and a further dispute concerning the settlement agreement arises, the arbitration clause in the original contract covers the subsequent dispute has also not been resolved by courts in a uniform manner.

21. The indicated lack of uniformity of approaches to situations (f) and (g) may be regarded as a problem in international trade. However, since the outcome of these situations appears to depend heavily on the facts of each case and the interpretation of the will of the parties, it may be difficult to devise a legislative solution that would be meaningful and generally acceptable. Nevertheless, the draft model provision may help resolve some of those issues, in particular where the parties have intended to subject the subsequent contract to the earlier contract containing an arbitration agreement, but the subsequent contract has not been signed by both parties or is not contained in an exchange of writings.

22. In considering cases (i) to (l) it is assumed that the arbitration agreement has been validly concluded by one pair of parties (or a set of multiple parties) and the issue is whether a third person who later becomes party to the contract, or becomes entitled to rely on the contract term, also becomes party to the arbitration agreement. A third person may become party to the contract, or may assume rights and obligations therefrom, by agreement between the original parties to the contract (such as when a contract confers a benefit to a third party, where a contract or certain contractual rights are assigned to a third party, where a new person becomes party to a contract as a result of novation, or where as a result of a merger or demerger of legal persons a new legal person is in a position to exercise rights and obligations). A third person may also become party to the contract by the operation of law, such as, for example, where an insurer, by way of subrogation, becomes entitled to exercise rights of the insured party. Such cases have been dealt with by courts, and solutions have been reached by interpreting the law governing the transfers of contractual rights and obligations.

23. When the Working Group discussed the cases (i) to (l), it was suggested that they should not be addressed by a model legislative provision (A/CN.9/468, para. 95). The Working Group may wish to agree with the suggestion. Alternatively, it may wish to study the matter further with a view to deciding whether it would be useful to express the principle to the effect that where a person who is not a party to a contract becomes (by agreement of the contract parties or by the operation of law) a party to the contract, or may in its own right invoke or enforce a term of the contract, any arbitration agreement in the contract is binding on that person.

Bill of lading (cases (e) and (h))

24. The use of bills of lading raises various issues regarding the validity of an arbitration agreement. One issue depends on whether the bill of lading itself contains an arbitration clause or whether the bill of lading is issued under a charter-party, which typically means that the bill does not contain an arbitration clause but rather refers, in varying terms, to the clauses contained in the charter-party and among them an arbitration clause. The law (including case law) is not well settled as to what kind of reference is necessary for the arbitration clause to be validly incorporated into the bill of lading. For example, a general reference such as "all terms and conditions as per charter-party" is sometimes considered sufficient to incorporate the arbitration clause, but not always. It has been, for instance, regarded as an insufficient reference if the arbitration clause in the charter-party is worded as covering "disputes arising under the charter-party" without expressly referring to disputes under the bill of lading; in such a case, a more specific reference has been required in order for the wording of the arbitration clause to be "manipulated" to cover also disputes under the bill of lading. On the other hand, a general reference has been regarded as sufficient if the arbitration clause in the charter-party is worded to cover disputes under the charter-party and under the bill of lading issued under the charter-party. Some national laws have adopted a specific provision on this issue. The Working Group may wish to consider that this matter is appropriately dealt with by draft paragraph (4), which leaves the question of what constitutes a valid reference to the law governing the incorporation by reference generally or to any special provisions on the incorporation of arbitration clauses contained in charter-parties into bills of lading.

25. Another issue might arise from the practice according to which bills of lading are signed by the carrier only and not by the other contracting party (the consignor/shipper). Under current law this issue has been solved in different ways such as that arbitration clauses in bills of lading are binding on the shipper, because they are regarded as cases *sui generis* that do not require a written message or signature of the shipper; because the writing requirement is interpreted broadly to cover the practices of issuance of bills of lading; or because the shipper (by preparing and giving to the carrier certain written information to be included in the bill of lading, in particular regarding the description of the goods, or filling out the blank form of a bill which contains an arbitration clause) is considered as having conveyed a written communication to the carrier who in turn signs the bill and gives it to the shipper. In any case, the Working Group may consider that this issue is adequately addressed by draft paragraph (3)(c).

26. A further issue concerning bills of lading is whether the consignee (who is not the contracting party at the time the bill of lading is issued) becomes bound by the arbitration clause in the bill of lading upon a valid transfer or endorsement of the bill.[13] Although many courts have reached the conclusion (some supported by specific legislation and others not) that the consignee is bound by the arbitration agreement in the bill of lading, there are some that would not reach that conclusion. Even if the consignee becomes bound by the arbitration agreement in the bill of lading, uncertainties may exist as to the exact moment when the consignee becomes so bound (e.g. as of when it has taken or demanded delivery of the goods from the carrier). The Working Group may wish to regard this issue as a specific issue similar to those discussed above in paragraphs 22 and 23, which is rooted in the law of transport and that, if any solution should be adopted, it should not interfere with the law governing the transfer of contractual rights and obligations to third parties.

C. Interpretative instrument regarding article II(2) of the New York Convention

(a) Introduction

27. As noted above in paragraph 11, the Working Group considered that a possible means to achieve the objective of ensuring a uniform interpretation of the form requirement that responded to the needs of international trade could also include the adoption of a declaration, resolution, or statement addressing the interpretation of the New York Convention that would reflect a broad understanding of the form requirement. It was noted that the issue of how best to achieve uniform interpretation of the New York Convention through a declaration, resolution, or statement should be further studied, including the public international law implications, to determine which was the optimal approach (A/CN.9/468, para. 93). The text below has been prepared to facilitate considerations as to the best approach to be taken.

(b) Vienna Convention on the Law of Treaties

28. The Vienna Convention on the Law of Treaties (1969) (the "Vienna Convention") sets forth several methods for determining the meaning of a treaty provision. Article 31, entitled "General rule of interpretation" reads:

> "1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

[13] This issue may be compounded with the incorporation-by-reference issue in a situation where the bill of lading refers to the terms and conditions in the charter-party, including the arbitration clause, and the question is whether the consignee (who may not be aware of the arbitration clause) becomes bound by such a clause upon endorsement of the bill of lading; that question is dealt with, for example, in article 22(2) of the Hamburg Rules.

"2. The context for the purpose of the interpretation of the treaty shall comprise, in addition to the text, including its preamble and annexes:
(a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
(b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

"3. There shall be taken into account, together with the context:
(a) *any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions*;
(b) *any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation*;
(c) *any relevant rules of international law applicable in the relations between the parties*. (*emphasis added*)

"4. A special meaning shall be given to a term if it is established that the parties so intended."

29. Article 32, entitled "Supplementary means of interpretation" reads:

"Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
(a) leaves the meaning ambiguous or obscure; or
(b) leads to a result that is manifestly absurd or unreasonable."

30. It appears that an interpretative instrument to be considered by the Working Group might be based on article 31(3)(b) of the Vienna Convention, given that the need for clarity in the interpretation of article II(2) of the New York Convention arises from changes in communication technologies and business practices as well as the increased use and acceptance of commercial arbitration in international trade.

31. Another possibility would be to base the instrument on a subsequent agreement of the States Parties to the New York Convention (as envisaged in article 31(3)(a) of the Vienna Convention). However, this possibility would seem to require each State party to express its agreement individually, a process that may take time and during the period in which agreement of the States Parties is occurring, doubt may be cast on the proper way of interpreting the Convention.

32. As stated in article 31(1) and (2) of the Vienna Convention, the context of the treaty and its object and purpose are also relevant for interpretation. An indication of that context and the object and purpose may be found in the resolution contained in the Final Act of the United Nations Conference on International Commercial Arbitration, which concluded the New York Convention. That resolution states that the Convention aims to "contribute to increasing the effectiveness of arbitration in the settlement of private law disputes ...".

33. The Conference resolution further states that:

"It considers that greater uniformity of national laws on arbitration would further the effectiveness of arbitration in the settlement of private law disputes, notes the work already done in this field by various existing organizations,[2] and suggests that by way of supplementing the efforts of these bodies appropriate attention be given to defining suitable subject matter for model arbitration statutes and other appropriate measures for encouraging the development of such legislation;"

[footnote:]"2 For example, the International Institute for the Unification of Private Law and the Inter-American Council of Jurists."

(Conference resolution, contained in Final Act of the United Nations Conference on International Commercial Arbitration - 10 June 1958)

34. The resolution, which was contemporaneous with the opening for signature of the Convention, expresses the Conference's "purpose of concluding a convention on the recognition and enforcement of foreign arbitral awards, and to consider other possible measures for increasing the effectiveness of arbitration in the settlement of private law disputes."

(c) Example of the use of an interpretative instrument

35. An example and precedent for the use of an instrument interpreting a convention is a declaration and recommendation issued by the Fourteenth Session of the Hague Conference on Private International Law regarding the 1955 Convention on the law applicable to international sales of goods.

36. The Explanatory Report published by the Hague Conference states that

"In the early 1950's, consumer sales were usually not accorded special treatment in domestic law but were subject to the rules applicable to contracts generally. Accordingly, at the time no need was perceived to develop special choice-of-law rules for consumer sales contracts. The 1955 Convention on the law applicable to international sales of goods thus regulates choice of law for *'ventes à caractère international d'objet mobiliers corporels'* without distinguishing between consumer sales and other sales.

"Beginning in the 1960's, the domestic law treatment of consumer sales underwent dramatic changes in many countries; in particular, substantial protection was for the first time given the buyer against many unfair practices or special risks."[14]

[14] Explanatory Report by Arthur Taylor von Mehren, Conference de La Haye de droit international prive, Hague Conference on private international law, *Actes et documents de la Quatorzième session 6 au 25 octobre 1980, Tome II, Ventes aux consommateurs, Consumer sales, Edités par le Bureau Permanent de la Conférence, 1982, p. 182.*

37. In particular, it was considered that the choice-of-law rules of the Convention were thought to give insufficient scope to protective policies that might be held, for example, by the internal law of the consumer's country of habitual residence. Against that background, it was initially suggested that a protocol to the 1955 Convention be prepared which would make it possible for States Parties to the Convention to make a reservation not to apply it to consumer sales, or excluding such sales from the scope of the Convention.[15] However, as stated in the Explanatory Report:

> "The Protocol proposal was seen to raise not only complex questions of public international law but also a general policy issue for the Conference, namely, in what way, if any, could existing Hague Conventions be adapted to take into account the emergence of new problems or the occurrence of fundamental changes in approaches to an area of law."[16]

38. After extensive discussions, a protocol to the 1955 Convention was not adopted. Instead, the Session adopted a decision concerning consumer sales in the form of a declaration and recommendation, reproduced below in paragraph 41.

39. As observed in the Explanatory Report,

> "Various views are possible with respect to the Declaration's precise nature and effect, juridically speaking. The Fourteenth Session concluded, nonetheless, that the Declaration represented the most effective and practical solution to the problem of adapting the Convention to the changes over the last quarter century in the substantive law regulation of consumer sales contracts."[17]

40. With a view to gathering and disseminating information regarding action taken under the Declaration, the Recommendation encourages the reporting of such action to the Permanent Bureau of the Hague Conference.[18]

41. The text of the Declaration and Recommendation reads:

> "Declaration and Recommendation relating to the scope of the Convention on the law applicable to international sales of goods, concluded June 15th, 1955
>
> I - DECLARATION
>
> "The States present at the Fourteenth Session of the Hague Conference on Private International Law,

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[15] *Ibid.*, p.183.

[16] *Ibid.*, p.184.

[17] *Ibid.*, p.186.

[18] *Ibid.*, p.187.

"Conscious of the existence today in many countries of measures protecting consumers,

"Considering that the interests of consumers were not taken into account when the *Convention of 15th June 1955 on the law applicable to international sale of goods* was negotiated,

"Recognizing the desire of certain States which have ratified the Convention to have special rules on the law applicable to consumer sales,

"Hereby declare that the *Convention of 15th June 1955 on the law applicable to international sale of goods* does not prevent States Parties from applying special rules on the law applicable to consumer sales.

II - RECOMMENDATION

"This Conference recommends that States Parties to the *Convention of 15th June 1955 on the law applicable to international sale of goods*, which apply special rules on the law applicable to consumer sales, inform the Permanent Bureau of this fact." [19]

(d) Body to issue interpretative instrument

42. The Working Group, when it considered the possibility of issuing an interpretative instrument regarding article II(2) of the New York Convention, did not fully consider potentially appropriate bodies to issue such an instrument.

43. One possibility would be for the States Parties to the New York Convention to issue it. Such an interpretative instrument agreed upon by the States Parties would be within the scope of article 31(3)(a) of the Vienna Convention.

44. Another possibility would be for the Commission to issue an interpretative instrument. Such an instrument could subsequently be noted in a resolution of the General Assembly.

45. With respect to the authority of the Commission to interpret the New York Convention, the basis for such authority could be derived from the text of General Assembly resolution 2205 (XXI) which established UNCITRAL.[20] By that resolution, the General Assembly established the Commission, "which shall have for its object the promotion of the progressive harmonization and unification of the law of international trade ..." (resolution 2205 (XXI), section I).

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[19] Conference de La Haye de droit international prive, Hague Conference on private international law, *Actes et documents de la Quatorzième session 6 au 25 Octobre 1980, Tome I, Matières diverses, Miscellaneous matters*, p. 62.

[20] *See* Establishment of the United Nations Commission on International Trade Law, General Assembly Res. 2205 (XXI) (17 Dec. 1966), *reproduced in UNCITRAL: The United Nations Commission on International Trade Law*, United Nations Sales No. E.86.V.8 (1986), at 55.

46. Section II, paragraph 8, of resolution 2205 (XXI) states:

"The Commission shall further the progressive harmonization and unification of the law of international trade by:

(a) Coordinating the work of organizations active in this field and encouraging co-operation among them;
(b) Promoting wider participation in international conventions and wider acceptance of existing model and uniform laws;
(c) Preparing or promoting the adoption of new international conventions, model laws and uniform laws and promoting the codification and wider acceptance of international trade terms, provisions, customs and practices, in collaboration, where appropriate, with organizations operating in this field;
(d) ***Promoting ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of the law of international trade;***
(e) Collecting and disseminating information on national legislation and modern legal developments, including case law, in the field of the law of international trade;
(f) Establishing and maintaining a close collaboration with the United Nations Conference on Trade and Development;
(g) Maintaining liaison with other United Nations organs and specialized agencies concerned with international trade;
(h) Taking any other action it may deem useful to fulfil its functions." (***emphasis added***).

47. The General Assembly has repeatedly recognised in its resolutions, the role of the Commission as co-ordinating body in the area of international trade law. The most recent General Assembly resolution on the work of the Commission (54/103 of 17 January 2000) "reaffirms the mandate of the Commission, as the core legal body within the United Nations system in the field of international trade law, to co-ordinate legal activities in this field."

48. If UNCITRAL is considered to be the appropriate issuing body, the attached preliminary draft is presented to stimulate a discussion of the form and content most suitable for an interpretative instrument.

(e) Preliminary draft of a possible declaration and recommendation

[Recommendation] regarding interpretation of article II(2) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, 10 June 1958,

The United Nations Commission on International Trade Law,

Recalling **resolution 2205 (XXI) of the General Assembly of 17 December 1966, which established the United Nations Commission on International Trade Law with**

the object of promoting the progressive harmonization and unification of the law of international trade,

Conscious of the fact that the Commission is composed with due regard to the adequate representation of the principal economic and legal systems of the world, and of developed and developing countries,

Conscious also of its mandate to further the progressive harmonization and unification of the law of international trade by, *inter alia*, promoting ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of the law of international trade,

Convinced that the wide adoption of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards has been an essential achievement in the promotion of the rule of law, particularly in the field of international trade,

Noting that according to article II(1) of the Convention "Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration"; and noting further that pursuant to article II(2) of the Convention "The term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams",

Noting also that the Convention was drafted in the light of business practices in international trade and communication technologies in use at the time, and that those technologies in international commerce have developed along with the development of electronic commerce,

Noting further that the use and acceptance of international commercial arbitration in international trade has been increasing,

Recalling that the Conference of Plenipotentiaries which prepared and opened the Convention for signature adopted a resolution, which states, *inter alia*, that the Conference "considers that greater uniformity of national laws on arbitration would further the effectiveness of arbitration in the settlement of private law disputes . . . ",

Considering that the purpose of the Convention, as expressed in the Final Act of the United Nations Conference on International Commercial Arbitration, of increasing the effectiveness of arbitration in the settlement of private law disputes requires that the interpretation of the Convention reflect changes in communication technologies and business practices,

Taking into account that subsequent international legal instruments such as the UNCITRAL Model Law on International Commercial Arbitration and the UNCITRAL Model Law on Electronic Commerce reflect the judgement of the Commission and the international community that legislation governing trade and arbitration should reflect new methods of communication and business practices,

Convinced that uniformity in the interpretation of the term "agreement in writing" is necessary for advancing predictability in international commercial transactions,

Recommends to Governments that the definition of "agreement in writing" contained in Article II(2) of the Convention should be interpreted to include [. . .] *[It is suggested that the operative part of the text to be inserted at this point should be substantially modelled on the revised text of article 7(2) of the Model Law on International Commercial Arbitration as discussed above at paras 15-26.]*

(f) Related issues

49. It may be recalled that other provisions in the New York Convention, as well as other Conventions on international commercial arbitration, contain additional requirements of writing which, if not interpreted in line with the decisions of the Working Group regarding the revision of the provisions on the writing requirement, might operate as barriers to the use of modern means of communication in international commercial arbitration.

50. Included among those requirements of form are, for example, the requirement to provide originals of the arbitration agreement and the award in article IV of the New York Convention, and the provision in article 4 of the Inter-American Convention on International Commercial Arbitration (Panama, 1975), according to which the enforcement of the award is to be ordered in the same manner as that of decisions handed down by national or foreign ordinary courts, in accordance with the procedural laws of the country where it is to be executed and the provisions of international treaties. Also article 35 of the UNCITRAL Model Law on International Commercial Arbitration, modelled on Article IV of the New York Convention, provides that the party relying on an award or applying for its enforcement should supply the duly authenticated original award or a duly certified copy thereof, and the original arbitration agreement or a duly certified copy thereof. In considering the drafts regarding the writing requirement for an arbitration agreement, the Working Group may wish to consider ways to ensure that a modified understanding of the writing requirement (art. 7(2) of the Model Law and art. II(2) of the New York Convention) would be reflected in the interpretation of the requirements that the party applying for the enforcement of an award supply the original arbitration agreement or a duly certified copy thereof.

51. At the thirty-second session of the Working Group the view was expressed that the issue of electronic commerce should be approached from a perspective broader than the writing requirement for the arbitration agreement and that, in considering steps to be taken with respect to the writing requirement for arbitration agreements, other form requirements in instruments governing international commercial arbitration should also be studied. It was also suggested that treating these issues as separate had the potential to encourage a proliferation of interpretative declarations on points that may be regarded, in the future, as requiring clarification (A/CN.9/468, para. 105). In that regard it may be noted that the Working Group on Electronic Commerce is expected to consider the issue of how to ensure that treaties governing international trade are interpreted in light of the

UNCITRAL Model law on Electronic Commerce. The Secretariat will report to the Working Group on Arbitration about those considerations.

II. Enforcement of interim measures of protection

A. Introductory remarks

52. There was general support in the Working Group for the proposal to prepare a legislative regime governing the enforcement of interim measures of protection ordered by arbitral tribunals (document A/CN.9/468, para. 67). It was generally considered that the legislative regime should apply to enforcement of interim measures issued in arbitrations taking place in the State where enforcement was sought as well as outside that State. It was noted that a number of States had adopted legislative provisions dealing with the court enforcement of interim measures, and it was considered desirable that a harmonised and widely acceptable regime be prepared by the Commission (*ibid.*, 68).

53. For the background discussion of interim measures of protection issued by an arbitral tribunal and the considerations concerning the desirability of preparing legislative provisions on their enforceability, reference is made to working paper A/CN.9/WG.II/WP.108, paragraphs 63 to 101, prepared for the thirty-second session of the Working Group.

54. The considerations of the thirty-second session of the Working Group on that matter are reflected in document A/CN.9/468, paragraphs 60 to 79. The Working Group concluded that the Secretariat be requested to prepare alternative draft provisions based on the considerations in the Working Group to be discussed at a future session.

55. It may be noted that the Working Group, in view of the preliminary nature of the discussion, did not take a decision as to whether the harmonised regime for the enforcement of interim measures should be in the form of an international convention or in the form of model legislation. While noting the view that the form of a convention was preferable, the Working Group considered that the decision as to the form would be made at a later stage. Notwithstanding that position, much of the discussion in the Working Group proceeded under the assumption that the solutions would be cast in the form of model legislation (A/CN.9/468, para.78). In light of that discussion, the drafts below are presented as elements for a model legislative provision to be added to the UNCITRAL Model Law on International Commercial Arbitration.

B. Model legislative provision on the enforcement of interim measures of protection

Variant 1

An interim measure of protection referred to in article 17, irrespective of the country in which it was made, shall be enforced, upon application by the interested party to the competent court of this State, unless

(i) Application for a corresponding interim measure has already been made to a court;

(ii) If the arbitration agreement referred to in article 7 was not valid;

(iii) The party against whom the interim measure is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present its case [with respect to the interim measure];[21]

(iv) The interim measure has been set aside or amended by the arbitral tribunal;

(v) The court or an arbitral tribunal in this State could not have ordered the type of interim measure that has been presented for enforcement[22] [or that the interim measure is manifestly disproportionate]; or

(vi) The recognition or enforcement of the interim measure would be contrary to the public policy of this State.

Notes

56. The above model legislative provision is based on chapter VIII of the UNCITRAL Model Law on International Commercial Arbitration (arts. 35 and 36),

[21] Since interim measures of protection are typically ordered before the parties have presented their cases regarding the substance of the dispute, it is suggested that the words "unable to present its case" should be understood as relating to the need for and the content of the interim measure in question. The Working Group may wish to consider whether this should be made clear by a wording along the lines of "unable to present its case with respect to the interim measure".

[22] The Working Group may wish to consider, whether the policy considerations regarding the types of interim measures that an arbitral tribunal or a court might order are necessarily the same as the policy considerations underlying the provision on the enforcement of an interim measure, in particular if the measure has been ordered abroad. For example, one reason for narrowing the scope of interim measures may be that there is less need for certain types of interim measures (e.g. because parties may achieve the purpose of a particular measure in other ways including through the judicial system). If the policy considerations are not the same, subparagraph (v) may have to be reworded to allow enforcement of potentially a broader scope of measures than could be ordered by a court of the enacting State in support of arbitration or by an arbitral tribunal in the enacting State.

which deals with the enforcement of arbitral awards (see in particular A/CN.9/468, paras. 70-73).

57. Among those jurisdictions that have enacted the Model Law, several have added provisions to the effect that chapter VIII of the Model Law applies to the enforcement of interim measures ordered by the arbitral tribunal under article 17 of the Model Law (or to the effect that an interim measure is treated, for the purposes of enforcement, as if it were an award). The consideration of that approach is reflected in paragraph 70 of document A/CN.9/468. There was considerable support for the view that that approach was too rigid and did not take into account the special features of interim measures of protection, which distinguished them from arbitral awards. In light of that view, the model provision presented above is based on article 36 and adapted to interim measures of protection.

Variant 2

The court may, upon application by the interested party, order enforcement of an interim measure of protection referred to in article 17, irrespective of the country in which it was made.

Notes

58. Variant 1, which is drafted in terms of "the court shall enforce, unless ...", is intended to establish an obligation to enforce if the prescribed conditions are met, whereas variant 2 is in terms of "the court may enforce ... ", expressing a degree of discretion. However, even variant 1 could be regarded as containing areas of discretionary assessment, such as the one indicated in square brackets in subparagraph (v), according to which the court would assess whether the interim measure is manifestly disproportionate and, if it finds it to be so, would have to refuse enforcement.

59. In deciding the approach to be taken, the Working Group may wish to discuss what the discretion in variant 2 should entail. It is suggested that the discretion should be limited to refusing enforcement of the interim measure (e.g. if the court regards it as grossly or manifestly disproportionate or unnecessary) and, in particular, that the discretion should not include the freedom to issue an enforcement order whose substance deviates from the interim measure ordered by the arbitral tribunal (e.g. if the interim measure consists of an order to a party to provide to the other party security for costs in a certain amount, the court would not be able to issue an enforcement order for security in a lower amount).

60. It may be considered that allowing the court to issue an enforcement order that deviates from the interim measure ordered by the arbitral tribunal would involve the court in an assessment of the merits of the order, which would imply that the court could or would have to repeat the decision-making process that had taken place in the arbitral tribunal. This would effectively mean that the court would not be enforcing the measure ordered by the arbitral tribunal but would be issuing its own measure. In considering the matter, it may be recalled that there was broad agreement in the Working Group that the uniform regime should be based on the

assumption that the court should not repeat the decision-making process in the arbitral tribunal and in particular that the court should not review the factual conclusions of the arbitral tribunal or the substance of the measure (A/CN.9/468, para. 71). (For a discussion of the procedural recasting of the measure, see below, para. 71-72).

61. Pursuant to the general view in the Working Group, both variants provide for the enforceability of interim measures "irrespective of the country in which the measure was made" (see A/CN.9/468, para. 67 and A/CN.9/WG.II/WP.108, para. 92).

62. Many national laws on arbitration have adopted the principle that the party has a choice between requesting the arbitral tribunal to order an interim measure of protection and requesting a court to issue such a measure. Such a principle, widely regarded as appropriate for international commercial arbitration, could also be said to be reflected in articles 9 and 17 of the UNCITRAL Model Law on International Commercial Arbitration. However in light of that principle, a party could, after obtaining an interim measure from the arbitral tribunal, apply to a court for substantially the same measure, and at the same time apply to a court for the enforcement of the measure issued by the arbitral tribunal. That sequence of events may lead to the undesirable situation where the court ends up considering two interim measures and two decisions might subsequently be issued. In order to avoid such a situation, one national law has a provision according to which the court may permit enforcement of a measure, unless application for a corresponding interim measure has already been made to a court. Such a provision (included in variant 1, subparagraph (i)) may also be considered for inclusion in a provision based on variant 2.

C. Possible additional provisions

63. The Working Group may wish to discuss whether any of the issues mentioned below need to be addressed in the model legislative provision, irrespective of which variant is ultimately adopted.

Duty to inform the court of any changes regarding the interim measure

64. It is in the nature of an interim measure of protection that it may be modified or terminated by the arbitral tribunal before the issuance of the award, and in any case the measure would cease to be operative once the award has been made. It may be an issue for consideration whether the law should require the party requesting enforcement to inform the court of any such changes. The purpose of such a duty to inform (which should exist at the time of requesting enforcement and continue thereafter) would be to enable the court to modify or terminate its enforcement order. The following draft wording, inspired by articles 18 and 22(3) of the UNCITRAL Model Law on Cross-Border Insolvency, is presented to facilitate the discussion:

Following the time it requests enforcement of the interim measure, the party shall inform the court promptly of any decision by the arbitral tribunal changing or repealing the interim measure. The court may, at the request of the party affected by the measure, modify or terminate the order for the enforcement of the interim measure.

Application for enforcement with leave of the arbitral tribunal

65. The Working Group may wish to consider whether the draft provision should state that the interested party may make a request for enforcement "with the approval of the arbitral tribunal". One purpose of such a provision would be that the enforcing court would have additional assurance that the circumstances have not changed and that the measure is still regarded as necessary by the arbitral tribunal, yet it would avoid putting the arbitral tribunal into a position where it would have to approach a national court with a view to obtaining enforcement (A/CN.9/468, para. 75).

Additional conditions attached to an enforcement order

66. It may be considered by the Working Group whether the model legislative provisions should contain a rule providing that the court might subject an order for the enforcement of an interim measure to conditions it considers appropriate (e.g. regarding security to be provided by the party applying for enforcement).

67. Interim measures of protection often contain orders or conditions (whether they are ordered by an arbitral tribunal or a court). The question here is whether, after the arbitral tribunal has ordered the measure (and made it subject to any orders or conditions considered appropriate), the court should involve itself in the decision-making process so as to establish whether any order or condition should be attached to the enforcement order. It may be considered that a rule giving the court the power to attach conditions to enforcement orders would be against the policy of the Working Group (referred to above in paragraph 60) that the uniform regime should not enable the court to repeat the decision-making process of the arbitral tribunal.

Application for enforcement whilst jurisdiction of arbitral tribunal is challenged

68. It may be, that by the time a party applies for the enforcement of an interim measure of protection, the other party has raised a plea that the arbitral tribunal does not have jurisdiction or that, after the tribunal has ruled that it has jurisdiction, the issue of jurisdiction is disputed in court. This situation is dealt with in article 16 of the Model Law. In such a case the court deciding on the enforcement of the interim measure would be taking a decision on a matter where it might subsequently be found that the arbitral tribunal does not have jurisdiction. This could prompt the court to refrain from deciding on the enforcement of the interim measure until the issue of jurisdiction has been clarified. However, the postponement of the decision could in fact encourage the other party to raise a plea that the arbitral tribunal does not have jurisdiction purely to delay enforcement of the interim measure even if the plea is unlikely to succeed. Due to this fact, the Working Group may wish to

consider a provision, inspired by article 36(2) of the UNCITRAL Model Law, along the following lines:

If a request has been made to a court to decide on the ruling by the arbitral tribunal that it has jurisdiction, the court where enforcement of an interim measure is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming enforcement of the interim measure, order the other party to provide appropriate security.

***Ex parte* measures**

69. The Working Group may wish to consider how *ex parte* interim measures (i.e. measures issued by the arbitral tribunal without hearing the other party) should be treated. It has been said that such measures may be appropriate where an element of surprise is necessary, i.e. where it is possible that the affected party may try to pre-empt the measure by taking action to make the measure moot or unenforceable. For example, when an interim order is requested to prevent a party from removing assets from the jurisdiction, the party might remove the assets out of the jurisdiction between the time it learns of the request and the time the measure is issued; thus, the party may effectively thwart the order without technically violating it.

70. The Working Group may wish to consider that the model legislative provisions should not interfere with the conditions under which an arbitral tribunal should be able to issue *ex parte* interim measures. However, the question arises whether, by the time the measure is presented to the court for enforcement, the other party should have been given notice of it and given the opportunity to comply with it voluntarily (or to request its termination or amendment). It may be considered that the surprise function of the measure is sufficiently preserved if the arbitral tribunal is to notify the affected party of the measure once it is issued (in such a notification the arbitral tribunal may, for example, call upon the party to comply with it or oppose it within the number of days determined by the arbitral tribunal). If that is so, the question is what should the court do if, by the time the measure has been presented to the court for enforcement, the affected party has not been notified of the measure. One possibility may be for the court to refuse enforcement and another one to delay the issuance of an enforcement order until the affected party has had the opportunity to comply with the measure voluntarily or to present its case.

Possibility of reformulating the interim measure ordered by the arbitral tribunal

71. One national law provides that, for the purpose of enforcing an interim measure, the court may recast or reformulate the measure if necessary. If the Working Group were to find a concept along those lines acceptable, it may be considered necessary to define the scope of possible reformulation or recasting. It is suggested that the possibility of recasting or reformulating the measure should be limited to making the measure capable of enforcement according to the procedural law of the court, and should not include the discretion to change the substance of the

measure. If the court considers that the measure is unenforceable because of its substance, it should decline enforcement and not modify the measure.

72. The circumstances in which it may be desirable to allow reformulation of the measure may be, for instance, where the measure, as formulated by the arbitral tribunal, does not correspond to the enforcement rules of the court. For example, the enforcing court may be bound by procedural rules or practices regarding the specific details to be presented in the enforcement order or regarding the manner in which enforcement is to be carried out, which may require the measure tc be recast in a such a way that it satisfies those procedural rules and practices. Another example might be an order for an interim measure directing a party to hand over to the other party certain documents. The law in the enforcing country may have privacy rules and rules of privilege which would require the court to enforce the order excluding documents covered by those rules.

Requirement that the court treat findings by the arbitral tribunal as conclusive

73. Some legal systems which give a party the choice to request an interim measure either from the arbitral tribunal or a national court (see above para. 62) have adopted a provision to the effect that "where a party applies to a court for an interim injunction or other interim order and an arbitral tribunal has already ruled on any matter relevant to the application, the court shall treat the ruling or any finding of fact made in the course of the ruling as conclusive for the purposes of the application". A similar provision is that "in considering a request for interim relief, the court shall give preclusive effect to any and all findings of fact of the arbitral tribunal including the probable validity of the claim which is the subject of the award for interim relief and which the arbitral tribunal has previously granted in the proceedings in question, provided that such interim award is consistent with public policy".

74. These provisions in national laws do not, strictly speaking, deal with the enforcement of interim measures ordered by an arbitral tribunal; rather, they provide that the court is to issue its own interim measure but that in so doing the court takes as granted certain findings of the arbitral tribunal. It may be considered whether the underlying idea might be adapted to the enforcement provision under consideration in the Working Group; for example, if the court should be given a degree of discretion whether to enforce interim measures ordered by an arbitral tribunal, it might also be provided that certain findings by the arbitral tribunal (e.g. as to the urgency and necessity of the measure, including that the applicant would suffer serious and irreparable loss if the measure is not issued), are not to be reassessed by the court.

Possibility of refusing enforcement of a measure because the arbitral tribunal lacked the power to order it

75. A further issue that the Working Group may wish to consider is whether the court should refuse to enforce an interim measure if the arbitral tribunal, pursuant to the agreement of the parties or pursuant to the law governing the arbitral procedure,

did not have the power to issue the measure. For example, according to some national laws, the arbitral tribunal has no power to issue interim measures of protection, or has no power to order certain types of measures (e.g. attachments of property) or is not authorised to order measures unless such authority is based on the agreement of the parties.

76. If the arbitral tribunal's power to order the measure should be among the express conditions for enforcement, an issue to be considered is whether it should be presumed that the arbitral tribunal had the power to order the interim measure, unless shown otherwise. A further question may be whether, in a cross-border enforcement (i.e. where the court is requested to enforce a measure issued in an arbitration taking place in a foreign country), the arbitral tribunal's power should be judged against the law of the place of arbitration, the law of the enforcing State or both of those laws.

Appeal from a court decision ordering enforcement

77. Urgency is often an element of interim measures of protection. In that light, it may be considered whether the model legislative provision (or the guide to enactment) should recommend limits to the right of appeal against a decision by the court permitting enforcement of the measure (e.g. that there be no appeal or that there be a requirement for leave to appeal).

Scope of enforceable measures

78. It may be recalled that in the Working Group reference was often made to three groups of interim measures of protection: (a) measures aimed at facilitating the conduct of arbitral proceedings, (b) measures to avoid loss or damage and measures aimed at preserving a certain state of affairs until the dispute is resolved, and (c) measures to facilitate later enforcement of the award to paragraph (further described in document A/CN.9/WG.II/WP.108, para. 63). While noting that that classification was one of a number of possible alternatives and that the examples of measures given under each category were not exhaustive, it was pointed out that the need for an enforcement mechanism was greatest for measures under (c) (e.g. attachments of assets, orders not to remove the subject matter of the dispute out of the jurisdiction or orders to provide security) and for some of the measures under (b) (e.g. orders to continue performing a contract during the arbitral proceedings or orders to refrain from taking action until the award was made). As to measures under (a) it was noted that, because the arbitral tribunal might "draw adverse conclusions" from the failure of the party to comply with the measure or might take the failure into account in the final decision on costs of the arbitral proceedings, there was less need to seek court intervention in the enforcement of the measure. However, no firm view was reached at that stage of the discussion as to whether, and if so in what way, those differences among interim measures should influence the drafting of the future enforcement regime (document A/CN.9/468, para. 69).

79. The Working Group may wish to discuss whether it would be desirable to describe or define the scope of measures to which the model legislative provision should apply. In discussing that question, it may be considered that a broad reference

to interim measures that an arbitral tribunal may issue is already contained in article 17 of the UNCITRAL Model Law on International Commercial Arbitration and that no additional description is needed in the provisions on the enforcement of those measures.

80. The Working Group may also wish to consider the relationship between certain interim measures covered by the draft model provisions being prepared (in particular the measures for the preservation or custody of evidence) and article 27 of the UNCITRAL Model Law, which deals with court assistance in taking evidence.

III. Conciliation

A. Introductory remarks

81. At its thirty-second session, the Working Group decided to prepare uniform rules on proceedings in which a person or a panel of persons is invited by the parties in dispute to assist them in an independent and impartial manner to reach an amicable settlement of the dispute (conciliation proceedings). The deliberations of the Working Group are contained in the document A/CN.9/468, paras. 18-59.

82. The Working Group did not take any firm decision as to the ultimate form of the uniform rules. However, in line with the preliminary considerations in the Working Group (A/CN.9/468, para. 20), the drafts prepared by the Secretariat are in the form of model legislative provisions. There was general agreement in the Working Group that the applicability of any uniform rules to be prepared should be restricted to commercial matters (*ibid.*, para. 21).

83. It may be noted that, in addition to the term "conciliation", other terms are used in practice, such as "mediation" and "neutral evaluation". Frequently these terms are used interchangeably without an apparent difference in meaning. In other cases a distinction is made depending on the procedural styles or techniques used. However, even if a particular meaning is attached to a term, the usage is not consistent. For example, according to one distinction, mediation implies an active involvement of the third person in the process of bringing the parties to an agreed settlement, whereas conciliation is regarded as a process where the conciliator is only a moderator of the dialogue between the parties in dispute. According to another distinction, a conciliator would take on an active role, which would include expressing opinions about the relative strengths and weaknesses of the cases presented by the parties and making suggestions or recommendations as to the content of a possible settlement, whilst a mediator would be expected to refrain from using evaluative methods and would rather facilitate a dialogue between the parties in a way that would be conducive to the parties themselves formulating and reaching a settlement. These different procedural techniques or approaches, even if they can be distinguished conceptually, in practice appear as a spectrum of many techniques which can be selected, combined and adapted to the expectations of the parties. Depending on the parties, the mediator or conciliator may have to use a number of different techniques in order to come to a settlement.

84. In view of the fact that the linguistic usage is not settled, the term "conciliation" has been used in the draft to indicate a broad notion encompassing various types of procedures in which parties in dispute are assisted by an independent and impartial person to settle a dispute.

85. Draft article 2(1) of the model legislative provisions is intended to express such a broad notion of conciliation. A clarification to that effect may be included in an explanatory text accompanying the uniform rules (a "guide to enactment" in the legislative drafting practice of the Commission), which the Working Group might decide to formulate to accompany the model legislative provisions.

86. The draft model legislative provisions, presented below, have been prepared pursuant to the considerations and decisions in the Working Group. After discussing them, the Working Group may wish to request the Secretariat to prepare a revised draft for the thirty-fourth session of the Working Group (New York, 21 May – 1 June 2001).

B. Model legislative provisions on conciliation

Article 1. Scope of application

[Unless otherwise agreed by the parties,] these legislative provisions apply to conciliation in commercial* transactions.

*** The term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business co-operation; carriage of goods or passengers by air, sea, rail or road.**

Notes

87. Non-mandatory nature of model legislative provisions. The Working Group has not taken a general stance as to whether all model legislative provisions on conciliation are to be non-mandatory or whether any of the provisions are to apply irrespective of contrary agreement of the parties. The Working Group may wish to consider this matter as it discusses the draft provisions. If all model provisions are to be regarded as non-mandatory, this could be expressed in a general manner, for example, by adding an expression "except if otherwise agreed by the parties" in draft article 1 as presented above.

88. Footnote on "commercial". There was general agreement in the Working Group that the applicability of any uniform rules to be prepared should be restricted to commercial matters. It was suggested that a flexible provision such as the one

contained in the footnote to article 1 of the UNCITRAL Model Law on International Commercial Arbitration was an appropriate way for defining which matters were to be considered commercial (A/CN.9/468, para. 21). Alternatively, an explanation as to the broad meaning of the term "commercial" could be included in a guide to enactment of the model legislative provisions.

89. International or international and domestic. The Working Group may wish to discuss whether the model legislative provisions should apply to conciliation generally, irrespective of whether or not it is considered international, or to international conciliation only. If it is decided that the provisions should apply only to international conciliation, a provision defining the meaning of "international" (modelled on art. 1(3) of the UNCITRAL Model Law on Arbitration) might be along the following lines:

(2) A conciliation is international if:

(a) the parties to an agreement to conciliate have, at the time of the conclusion of that agreement, their places of business in different States; or

(b) one of the following places is situated outside the State in which the parties have their places of business:

(i) the place where meetings with the conciliator are to be held[23] [if determined in, or pursuant to, the agreement to conciliate];

(ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or

(c) the parties have [expressly] agreed that the subject-matter of the agreement to conciliate relates to more than one country.

(3) For the purposes of this article:

(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the agreement to conciliate;

(b) if a party does not have a place of business, reference is to be made to the party's habitual residence.

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[23] The expression "the place where meetings with the conciliator are to be held" has been modelled on art. 9(2) of the UNCITRAL Conciliation Rules. To cater for cases where the parties would communicate with the conciliator by electronic means without a meeting being envisaged, the conciliator's place of business or habitual residence might be added as an additional criterion in subparagraph (b).

90. Applicability of the model legislative provisions. The Working Group may wish to consider whether the draft article should contain further provisions defining when the model legislative provisions are to apply. Possible criteria may be, for example, that the conciliation proceedings take place in the State that has enacted the model legislative provisions (or if meetings with the conciliator are to be held in the enacting State), that one of the parties has a place of business in the State, or that the parties agreed that the law of the enacting State is to apply. It will be noted that in view of the increased use of electronic communications and telephone conference calls for the settlement of commercial disputes, it may be advisable to include further criteria such as the agreement of the parties as to which place is to be regarded as the place of conciliation, the location of the organisation that facilitates or administers the process (such as a mediation or conciliation centre) and the place of business or residence of the conciliator or the person presiding the conciliation panel.

Article 2. [General provisions] [Conduct of conciliation]

(1) The conciliator or a panel of conciliators assists the parties in an independent and impartial manner in their attempt to agree on a settlement of their dispute.

(2) The parties determine, [by reference to conciliation rules or otherwise], the selection of the conciliator or the panel of conciliators, the manner in which the conciliation is to be conducted and other aspects of the conciliation proceedings.[24]

(3) [Subject to agreement of the parties] [Failing such agreement] the conciliator or the panel of conciliators may conduct the conciliation proceedings in such a manner as it considers appropriate, taking into account the circumstances of the case, the wishes the parties may express, [including any request by a party that the conciliator hear oral statements,] and the need for a speedy settlement of the dispute.

(4) The conciliator shall be guided by principles of objectivity, fairness and justice. [Subject to agreement of the parties, the conciliator may give consideration to, among other things, the rights and obligations of the parties, the usages of the trade concerned and the circumstances surrounding the dispute, including any previous business practices between the parties.]

[(5) The conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute.]

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[24] An alternative provision (somewhat more detailed) may be along the following lines: (2) The parties determine, [by reference to conciliation rules or otherwise], the selection of the conciliator or the panel of conciliators, the time and place of conciliation proceedings, the methods of communications between the conciliator or the panel of conciliators with the parties, any administrative assistance to facilitate the conduct of the conciliation and other aspects of the conciliation proceedings.

Notes

91. Draft article 2 has been prepared in response to the view of the Working Group that it would be useful to prepare a uniform provision setting out the guiding principles of conciliation proceedings. Such a general provision would contribute to harmonising standards of conciliation and would also be helpful in defining conciliation proceedings to which the model legislative provisions on conciliation would apply. It was agreed that article 7 of the UNCITRAL Conciliation Rules provides a good basis for drafting the uniform provision (A/CN.9/468, paras. 56-59; see in particular paras. 57 and 58 for possible modifications of the draft article).

92. Paragraphs (4) and (5). The Working Group may wish to consider whether the words in the square brackets in paragraph (4) are needed. Given the different approaches to conciliation, the focus of the process will not always be the same: for example, the rights and obligations of the parties or previous business practices indeed play an important role in many conciliations, but there are also many cases where the conciliator refrains from evaluating contractual rights and obligations, or where the solution is sought in a modification of contractual rights and obligations or in future business practice. In order to describe that variety, the text uses the formula "the conciliator *may* give consideration to". However, because of the use of the word "may", which makes the provision imprecise, consideration might be given to placing the description of the substance of the decision-making process in a guide to enactment. For similar reasons, the Working Group may wish to consider whether paragraph (5) is needed. If it is considered that the possibility of making proposals for the settlement would not be in doubt without the provision, the provision may be deleted, in particular since it is often regarded as best practice to avoid, as much as possible, making proposals on how to settle the dispute.

Article 3. Communication between conciliator and parties

Unless otherwise agreed by the parties, the conciliator or the panel of conciliators may meet or communicate with the parties together or with each of them separately.

Note

93. Discussion in the Working Group: document A/CN.9/468, paras. 54-55. It may be the case that separate meetings between the conciliator and the parties are so usual that a conciliator is presumed to be free to use this technique, save for any express restriction agreed to by the parties. The purpose of this provision is to put the issue beyond doubt.

Article 4. Disclosure of information

[Alternative 1:] **When the conciliator or the panel of conciliators receives information concerning the dispute from a party, it may disclose the substance of that information to the other party in order that the other party may have the opportunity to present any explanation which it considers appropriate. However, [the parties are free to agree otherwise, including that] the conciliator**

or the panel of conciliators shall not disclose information received from a party, when the party gives the information to the conciliator or the panel of conciliators subject to a specific condition that it be kept confidential.

[Alternative 2:] **Subject to the agreement of the parties, nothing which is communicated to the conciliator or the panel of conciliators by a party in private concerning the dispute may be disclosed to the other party without the express consent of the party who gave the information.**

Note

94. Discussion in the Working Group: document A/CN.9/468, paras. 54-55.

Article 5. Commencement of conciliation[23]

The conciliation proceedings in respect of a particular dispute commence on the date on which a [written] invitation to conciliate that dispute made by one party is accepted [in writing] by the other party.

Notes

95. The Working Group might discuss whether it would be acceptable to leave the question of when a conciliation begins (and ends) to the judgement of whoever has to make that judgement (such as a court), according to the facts and circumstances of the case, and not to regulate that question in the model legislative provisions. Certainty as to the date at which conciliation proceedings begin may, however, be desirable if conciliation proceedings were to affect the running of the prescription or limitation period.

96. The Working Group may also wish to consider whether it would be useful to include in the draft article a provision dealing with a situation when there is no response to the invitation to conciliate. Such a provision, modelled on article 4(2) of the UNCITRAL Conciliation Rules, might read: If the party initiating conciliation does not receive a reply within [thirty] days from the date on which the invitation has been sent, or within such other period as specified in the invitation, the party may elect to treat this as a rejection of the invitation to conciliate.

Article 6. Termination of conciliation[24]

The conciliation proceedings are terminated:

(a) by the signing of the settlement agreement by the parties, on the date of the agreement;

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[23] Cf. Article 2 of the UNCITRAL Conciliation Rules.

[24] Cf. Article 15 of the UNCITRAL Conciliation Rules.

(b) by a written declaration of the conciliator, after consultation with the parties, to the effect that further efforts at conciliation are no longer justified, on the date of the declaration;

(c) by a written declaration of the parties addressed to the conciliator to the effect that the conciliation proceedings are terminated, on the date of the declaration; or

(d) by a written declaration of a party to the other party and the conciliator, if appointed, to the effect that the conciliation proceedings are terminated, on the date of the declaration.

Article 7. Limitation period[27]

(1) *[Alternative 1:]* When the conciliation proceedings commence, the limitation period regarding the claim that is the subject matter of the conciliation ceases to run. *[Alternative 2:]* For the purposes of the cessation of the limitation period, the commencement of the conciliation proceedings is deemed to be an act that causes the limitation period to cease to run.

(2) Where the conciliation proceedings have terminated without a settlement, the limitation period is deemed to have continued to run. If in such a case the limitation period has expired or has less than [six months] to run, the claimant is entitled to a further period of [six months] from the date on which the conciliation proceedings terminated.

Note

97. Discussion in the Working Group: document A/CN.9/468, paras. 50-53.

Article 8. Admissibility of evidence in other proceedings

(1) Unless otherwise agreed by the parties, a party who participated in the conciliation proceedings [or a third party[28]] shall not rely on, or introduce as evidence, in arbitral or judicial proceedings, whether or not such arbitral or judicial proceedings relate to the dispute that was the subject of the conciliation proceedings:

(a) Views expressed or suggestions made by a party to the conciliation in respect of [matters in dispute or] a possible settlement of the dispute;

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[27] Cf. articles 13 and 17 of the Convention on the Limitation Period in the International Sale of Goods as amended by the Protocol amending the Convention on the Limitation Period in the International Sale of Goods.

[28] It was suggested in the Working Group that the model provision should cover cases where views, admissions or proposals made during conciliation proceedings were sought to be raised in subsequent court or arbitral proceedings not by a party who had participated in the conciliation but by a third party such as a sub-contractor of a party; A/CN.9/468, para. 25.

(b) Admissions made by a party in the course of the conciliation proceedings;

(c) Proposals made by the conciliator;

(d) The fact that a party to the conciliation had indicated its willingness to accept a proposal for settlement made by the conciliator.

(2) The disclosure of the information referred to in paragraph (1) of this article shall not be ordered by the arbitral tribunal or the court [whether or not the arbitral or judicial proceedings relate to the dispute that is the subject of the conciliation proceedings].

(3) Where evidence has been offered in contravention of paragraph (1) of this article, the arbitral tribunal or the court shall treat such evidence as inadmissible.[29]

Notes

98. Discussion in the Working Group: document A/CN.9/468, paras. 22-30.

99. The Working Group may wish to consider whether it would be useful to clarify, in the model provision or otherwise, that all information that is admissible in evidence does not become inadmissible solely by reason of it being raised in conciliation. It is only certain statements made in conciliation proceedings (i.e. views, admissions, proposals and indications of willingness to settle) that are inadmissible, not any underlying evidence that gave rise to the statement. Thus, evidence that is used in conciliation is admissible evidence in any subsequent proceedings just as it would be if the conciliation had not taken place.

100. The purpose of establishing the evidentiary privilege for certain types of information in draft article 8 is to promote candour of the parties in the conciliation. In order to achieve that, the parties must be able to enter into the conciliation knowing the scope of the rule and that it will be applied. However, as noted in paragraph 33 of document A/CN.9/468, there may be situations where evidence of certain facts would be inadmissible pursuant to draft article 8, but where the inadmissibility would have to be overridden by an overwhelming need to accommodate compelling reasons of public policy. Such an exceptional situation may arise, for example: where there is a need to disclose threats made by a participant to inflict bodily harm or unlawful loss or damage; where a participant attempts to use the conciliation to plan or commit a crime; where evidence is needed to establish or disprove an allegation of professional misconduct based on the conduct occurring during a conciliation; where evidence is needed in a proceeding in which fraud or duress is in issue regarding the validity or enforceability of an agreement reached by the parties; where statements made during a conciliation evidence a significant threat to public health or safety. While it seems that the evidentiary rule in draft article 8 would be overridden in such situations, irrespective

[29] A/CN.9/468, para. 27.

of whether the exception is expressed in the model legislative provision, the question is whether, for clarity and the avoidance of doubt, such exceptions should be expressed in the model legislative provisions or whether it should be left to the applicable law of evidence to deal with those exceptions when they arise.

Article 9. Role of conciliator in other proceedings

(a) Unless otherwise agreed by the parties, the conciliator shall not act as an arbitrator[30] or as a representative or counsel of a party in any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation proceedings.

(b) Testimony of the conciliator regarding the facts referred to in article 7(1) shall not be admissible in any arbitral or judicial proceedings in respect of a dispute that was or is the subject of the conciliation proceedings.

(c) Paragraphs (1) and (2) apply also in respect of another dispute that has arisen from the same contract or another contract forming part of a single commercial transaction.[31]

Note

101. Discussion in the Working Group: document A/CN.9/468, paras. 31-37.

Article 10. Resort to arbitral or judicial proceedings

[Varient 1] **The parties shall not initiate, during the conciliation proceedings, any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation proceedings, except that a party may initiate arbitral or judicial proceedings where, in its opinion, such proceedings are necessary for preserving its rights.**

[Varient 2] **The parties may agree not to initiate, during the conciliation proceedings, any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation proceedings. However, a party may initiate arbitral or judicial proceedings if in its opinion such proceedings are necessary for preserving its rights [and if the party notifies the other party of its intention to commence the proceedings]. The initiation of such proceedings by the party is not in itself regarded as the termination of the conciliation proceedings.**

[30] It may be noted that the existing rules governing the conduct of arbitrators address the question of whether and in what circumstances a person who has acted as a conciliator may accept an appointment as an arbitrator. Nevertheless, the Working Group might wish to consider that it is desirable to refer to arbitrators in subpara. (a) in order to put it beyond doubt that the parties are free, when they so agree, to appoint a conciliator as an arbitrator.

[31] A/CN.9/468, para. 36.

[Varient 3] **To the extent that the parties have expressly undertaken not to initiate [during a certain time or until conciliation proceedings have been carried out] arbitral or judicial proceedings with respect to a present or future dispute, such an undertaking shall be given effect by the court or the arbitral tribunal until the agreed time has expired or the conciliation proceedings are in progress.**[32]

Note

102. Discussion in the Working Group: document A/CN.9/468, paras. 45-49.

Article 11. Arbitrator acting as conciliator

It is not incompatible with the function of an arbitrator if the arbitrator raises the question of a possible conciliation and, to the extent agreed to by the parties, participates in efforts to reach an agreed settlement.

Notes

103. Discussion in the Working Group: document A/CN.9/468, paras. 41-44.

104. As was noted by the Commission during its preparation of the text that was later adopted as the UNCITRAL Notes on Organizing Arbitral Proceedings (in particular para. 47 of the Notes), there exist different attitudes and practices regarding the question whether, and if so in what way, it is appropriate for an arbitrator to raise the possibility of settlement and whether an arbitrator might take on some functions of a conciliator.[33] Furthermore, some rules on arbitration

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[32] A/CN.9/468, para. 48.

[33] In the report of the Commission on the work of its twenty-seventh session (1994), doc. A/49/17 (reproduced in the UNCITRAL Yearbook, vol. XXV: 1994), it is stated:

"143. The views differed as to whether it was appropriate for the arbitral tribunal on its own initiative to raise the question of a possible settlement and as to the manner in which the arbitral tribunal might be involved in any settlement negotiations. It was stated that in some legal systems it was considered incompatible with the function of the arbitrator to inquire about settlement; moreover, it was said that such an inquiry might worsen the procedural atmosphere, might put a party in an uncomfortable situation of having to refuse to settle, might raise doubts about the impartiality of the arbitrators and, in case of unsuccessful conciliation, increase the likelihood of objections against the award.

"144. Statements were made about legal systems where an inquiry about possible settlement was provided for by the law governing court proceedings and where such an inquiry was sometimes considered acceptable and desirable in arbitral proceedings, provided that it was done in a way that did not compromise the impartiality of the tribunal.

"145. As to the case where the parties on their initiative requested the arbitral tribunal to assist them in reaching a settlement, one view that the roles of an arbitrator and a conciliator were difficult to reconcile and that it was therefore appropriate for the arbitrators to refuse to act as conciliators or to be reserved in responding to such an initiative. Another view was that, while the arbitral tribunal should always be careful to

(including codes of ethics governing the conduct of arbitrators) have provisions on arbitrators acting as conciliators. In the light of those differences, the Working Group may wish to consider whether it would be preferable not to formulate a uniform provision on the matter and leave it to arbitration rules and practices.

Article 12. Enforceability of settlement

If the parties reach agreement on a settlement of the dispute and the parties and the conciliator or the panel of conciliators have signed the binding settlement agreement, that agreement is enforceable *[the enacting State inserts provisions specifying provisions for the enforceability of such agreements].*

Notes

105. Discussion in the Working Group: document A/CN.9/468, paras. 38-40.

106. Legislative solutions regarding the enforceability of settlements reached in conciliation proceedings differ widely. Some States have no special provisions on the enforceability of such settlements, with the result that they would be enforceable as any contract between the parties. This understanding that conciliation settlements are enforceable as contracts has been restated in some laws on conciliation.

107. However, there are also laws that provide for expedited enforcement of such settlements. Reasons given for introducing an expedited enforcement usually aim to foster the use of conciliation and to avoid situations where a contract action to enforce a settlement may take months or years to reach judgement and then enforcement.

108. Several laws have provisions to the effect that a written settlement agreement is to be treated as an award rendered by an arbitral tribunal and is to have the same effect as a final award in arbitration, provided the result of the conciliation is reduced to writing and signed by the conciliator or conciliators and the parties or their representatives.

109. According to another approach found in one national law, the settlement agreement is deemed to be an enforceable title, and the rights, debts and obligations that are certain, express and capable of being enforced and that are recorded in the settlement agreement are enforceable pursuant to the provisions for the enforcement of court decisions. It should be noted, however, that that provision applies to conciliation administered by approved institutions where the conciliators are selected from a list maintained by an official organ.

110. In other laws, it is provided that conciliation settlements are treated as awards, but that such settlements "may, by leave of the court" be enforced in the same manner as a judgement, a wording that appears to leave a degree of discretion to the court in enforcing the settlement.

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maintain its partiality, the benefits of a settlement justified the arbitral tribunal in being forthcoming in responding to such requests of the parties."

111. There is also one draft legislative solution whose elements include the following: a party entering into a settlement agreement may, with the consent of all parties to such agreement, petition a court to enter a judgement in accordance with the settlement agreement, provided that (i) a petition is filed with the court within a certain number of days of the signing of the settlement; (ii) that adequate notice is given to all parties that signed the settlement within a certain number of days of the filing of such petition; and (iii) no party to the settlement files an objection with the court within a certain number of days of receipt of such notice. If an objection has been filed, the court may in certain cases, including where the interests of justice so require, deny the petition, without prejudice to any contractual rights or remedies that may otherwise be available.

112. The Working Group may wish to discuss whether it would be desirable and feasible to prepare a uniform model provision that would be universally acceptable and, if so, what should be the substance of the uniform rule. Alternatively, it may be considered that, because of the diversity of approaches, draft article 12 should not provide a uniform solution; instead, it should be left to the guide to enactment, which the Working Group may wish to adopt along with the model legislative provisions, to discuss possible solutions. The guide to enactment might, in addition to presenting solutions such as those mentioned above, mention mechanisms recognised in some national laws for making settlements capable of expedited enforcement (e.g. if a settlement is notarised, formalised by a judge or co-signed by the counsel of the parties). Another solution that could be mentioned would be to empower the parties who have settled a dispute to appoint an arbitration tribunal with a specific purpose of issuing an award on agreed terms based on the agreement of the parties. Such a specific power might be needed where the law applicable to arbitral proceedings does not allow the initiation of arbitral proceedings if there is no dispute between the parties.